No. 91-418

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC., and COMMODORE AVIATION, INC.,

Petitioners,

—v.—

JESUS E. CALDERON, as Personal Representative of the ESTATE OF ELVIA MERCEDES CALDERON, Deceased, and on behalf of JESUS E. CALDERON, CARLOS ARTURO CALDERON, CLAUDIA ELENA CALDERON and LUIS ALFONSO CALDERON,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of a district court that the Warsaw Convention cause of action is not exclusive of state actions, which precedes a remand order, is insulated from federal appellate review by 28 U.S.C. § 1447(d)?

PARTIES TO THE PROCEEDING BELOW

The parties before the Court and to the proceedings below are:

1. Petitioners AEROVIAS NACIONALES DE COLOMBIA, S.A. (AVIANCA), AVIANCA, INC. and COMMODORE AVIATION, INC. (COMMODORE).

2. Respondents Jesus E. Calderon, as personal representative of the Estate of Olivia Mercedes Calderon (Deceased) and on behalf of Jesus E. Calderon, Carlos Arturo Calderon, Claudia Elena Calderon and Luis Alfonso Calderon.

RULE 29.1 LIST

1. AVIANCA has the following non-wholly owned subsidiaries: Helicopteros Nacionales de Colombia, S.A. (Helicol), Aerocomercio Internal Ltda., Sociedad Productora y Comerc. de Alimentros Ltda. (Presto), Corporacion de Viajes Ltda. (Coviajes) and Sociedad Aeronautica de Medellin Consolidada, S.A. (SAM).

2. AVIANCA, INC. is a wholly owned subsidiary of AVIANCA.

3. COMMODORE is a subsidiary of Israel Aircraft Industries International, Inc.

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The Petitioners AEROVIAS NACIONALES DE COLOMBIA, S.A. (AVIANCA), AVIANCA, INC. and COMMODORE AVIATION, INC. (COMMODORE) respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-captioned proceeding on April 19, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 929 F.2d 599, and is reprinted in the Appendix hereto at 1a, *infra*.

The Decision and Order of Remand of the United States District Court for the Southern District of Florida (Aronovitz, J.) is reported at 738 F. Supp. 485, and is reprinted in the Appendix hereto at 8a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 19, 1991. The Court of Appeals denied a timely petition for rehearing on June 17, 1991. The Order denying the petition for rehearing is reprinted in the Appendix hereto at 12a, *infra*. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 28 U.S.C. § 1447(d) which provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

On January 25, 1990, an AVIANCA Boeing 707 aircraft operating as Flight 052 from Colombia to New York crashed in the vicinity of Cove Neck, New York. Of the 149 passengers on board, 65 were killed and 84 were injured.

Numerous wrongful death and personal injury actions arising out of this accident were filed against Petitioners in various United States District Courts and in the state courts of Florida. The Judicial Panel on Multidistrict Litigation transferred all pending federal actions to the Eastern District of New York and Chief Judge Thomas C. Platt for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Air Disaster Near Cove Neck, New York, on January 25, 1990*, No. 843 (J.P.M.D.L. June 14, 1990).

The present case is one of the wrongful death actions arising out of the crash. Respondents' decedent was travelling on AVIANCA Flight 052 pursuant to a ticket which provided for "international transportation" within the meaning of Article 1 of a treaty of the United States known as the Warsaw Convention.[1] It is undisputed that the Warsaw Convention is applicable to this and the other pending actions arising out of the crash of Avianca Flight 052.[2]

The action originally was commenced in the Circuit Court for Dade County, Florida and sought relief solely pursuant to the Florida Wrongful Death Statute. The Complaint as filed did not make reference to the Warsaw Convention or assert any rights thereunder, although the Complaint did allege that Respondents' decedent was killed in the accident involving AVIANCA Flight 052 on January 25, 1990. The Complaint also alleged that Respondents' decedent was travelling pursuant to a ticket for AVIANCA Flight 052, a flight which originated in Colombia and was destined for New York.

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. App. § 1502.

2 The Warsaw Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, Article 1, 49 Stat. 3014. It also is undisputed that Article 17 of the Convention creates a cause of action for wrongful death. *See Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

The District Court Decision: Petitioners timely removed the action to the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. §§ 1331 and 1441 on the ground that Respondents' claims arise under and are governed by the Warsaw Convention and that federal question jurisdiction therefore existed.[3]

After removal, Respondents moved to remand the action to state court on the ground that the Complaint did not invoke or raise any federal law, treaty or statute and was founded solely on the Florida Wrongful Death Statute. In support of the motion, Respondents argued that the Warsaw Convention does not provide the exclusive cause of action but provides only an exclusive *remedy* that preempts inconsistent state law remedies. Therefore, Respondents' argument continued, there was no federal question involved so as to confer jurisdiction by removal on the District Court pursuant to 28 U.S.C. §§ 1331 and 1441.

In opposing the motion, Petitioners argued that regardless of the allegations in the Complaint and the reliance by Respondents on local state law for the alleged cause of action for wrongful death, the Warsaw Convention applied by operation of law to provide Respondents with the exclusive cause of action and therefore removal was proper.

Prior to deciding the remand motion, the District Court reached a decision that the Warsaw Convention cause of action is not exclusive even where the Convention unquestionably applies to the transportation. Appendix at 9a, *infra*. In reaching this decision, the District Court reasoned as follows:

> This Court recognizes that a number of Federal Circuit Courts of Appeals have found the Warsaw Convention to, in a sense, preempt state remedies in supplying an exclusive cause of action for incidents of the type at issue here. *See, e.g., Boehringer-Mannheim Diagnostics v. Pan American World Airways*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186, 105 S.Ct. 951, 83

3 It is conceded that removal was available only on federal question grounds.

> L.Ed.2d 959 (1985); *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979). Absent, however, any clear guidance from the Eleventh Circuit Court of Appeals, this Court shall adhere to the view set forth by Chief Judge James Lawrence King in *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986), in holding that the Warsaw Convention, rather than supplying an exclusive cause of action, provides only an exclusive remedy for such actions, however founded.

Appendix at 9a, *infra*.

Having determined that the Warsaw Convention cause of action is not exclusive, the District Court then proceeded to decide the remand motion and held: "Thus, a cause of action may be stated in terms of state law, though a plaintiff choosing to plead as such remains subject to the limitations set forth by the Convention, including, of course, limitations on damages" and that "[t]his Court will not now disturb Plaintiff's choice of forum." Appendix at 9a-10a, *infra*. The District Court granted the motion and remanded the action to the Circuit Court for Dade County, Florida. Appendix at 10a, *infra*.

The Court of Appeals Decision: Petitioners filed a Petition for Writ of Mandamus, pursuant to 28 U.S.C. § 1651, requesting the Eleventh Circuit to direct the District Court to vacate the remand order and reinstate the action. The Petition for a Writ of Mandamus was denied on July 24, 1990. Before the Petition was denied, Petitioners also filed a Notice of Appeal from the decision of the District Court that the Warsaw Convention did not provide the exclusive cause of action. Pursuant to an Order of the Court of Appeals dated October 19, 1990, the jurisdictional issue was carried with the case and was fully addressed in the briefs along with the substantive issue of whether the Warsaw Convention provides Respondents' exclusive cause of action. The appeal was

argued before a panel of the Court of Appeals on December 20, 1990.

The Court of Appeals, in an Opinion and Order entered April 19, 1991, dismissed the appeal for lack of appellate jurisdiction pursuant to 28 U.S.C. § 1447(d), finding that "the substantive issue [as to the exclusivity of the Warsaw Convention cause of action] is intrinsic to the district court's decision to remand for lack of subject matter jurisdiction." Appendix at 6a, *infra*. The Court of Appeals concluded that it did "not have jurisdiction to consider the merits of the substantive issues" presented by Petitioners as to whether the Warsaw Convention provides Respondents with the exclusive cause of action. Appendix at 6a-7a, *infra*. A timely petition for rehearing was denied by Order dated June 17, 1991. Appendix at 12a, *infra*.

REASONS FOR GRANTING THE WRIT

The issue presented is the extent to which 28 U.S.C. § 1447(d) shields from review a district court's decision regarding the scope and effect of the Warsaw Convention cause of action. As the Convention is a treaty of the United States, this issue has far reaching ramifications, not only on the substantive rights of Petitioners in this case, but on all pending and future actions to which the Convention applies. The Court below has expanded the nonreviewability rule of 28 U.S.C. § 1447(d) to encompass, not simply remand orders, but decisions of a substantive non-jurisdictional nature if the decision has a subsequent effect on the separate decision to remand.

The Court of Appeals for the Eleventh Circuit incorrectly held that 28 U.S.C. § 1447(d) precluded it from reviewing the substantive decision of the District Court, prior to remand, that the Warsaw Convention did not provide Respondents with the exclusive cause of action. In holding that it had no jurisdiction to review this substantive decision, the Eleventh Circuit has decided a federal question in a way that conflicts

in principle with the applicable decisions of the Court and numerous other Circuit Courts. The Eleventh Circuit decision thereby has sanctioned such a departure by the District Court from the accepted and usual principles of treaty interpretation as to require the Court to exercise its powers of supervision.

The decision of the Eleventh Circuit also has decided incorrectly a recurring important question of federal appellate jurisdiction, *viz*, the intended scope of § 1447(d), which should be reviewed and settled by the Court in order to insure uniformity in the application of § 1447(d).

I

THE ELEVENTH CIRCUIT'S FAILURE TO REVIEW THE DISTRICT COURT'S DECISION AS TO THE EXCLUSIVITY OF THE WARSAW CONVENTION CAUSE OF ACTION CONFLICTS IN PRINCIPLE WITH THE COURT'S DECISION IN *WACO V. UNITED STATES FIDELITY & GUARANTY CO.* AND THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

This case does not involve an appeal from a remand order. This case involves an appeal from a District Court's substantive legal decision, regarding the scope and effect of a treaty of the United States, which *preceded* a remand order.

Prior to remand, the District Court held that the Warsaw Convention does not provide Respondents with the exclusive cause of action. The Eleventh Circuit held that this decision is not reviewable pursuant to 28 U.S.C. § 1447(d). In reaching its decision, the Eleventh Circuit characterized the District Court's exclusivity decision as "intrinsic" to the remand order and held that the decision did not stand apart from the remand order for appeal purposes. Appendix at 6a, *infra*. This holding of the Court of Appeals is erroneous and conflicts in principle with the Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) and numerous decisions of other Circuit Courts of Appeal.

In *Waco*, 293 U.S. 140 (1934), a case involving a district court's order of dismissal of a party's cross-action (third-party action) which resulted in the remand of the case to state court, the Fifth Circuit Court of Appeals had dismissed the appeal on the grounds that no appeal lies from an order of remand. In reversing the Fifth Circuit and holding the dismissal order reviewable, the Court stated:

> If the District Court's order stands the cross-action will be no part of the case which is remanded to the state court. Indeed, if the District Court was right, the cause could not have been remanded except for the exclusion of the [third-party defendant] as a party. True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

Waco, 293 U.S. at 143.

The limitations on the scope of the nonreviewability rule as to remand orders, as enunciated by *Waco*, have been recognized by numerous Circuit Courts of Appeal in interpreting and applying 28 U.S.C. § 1447(d). *See Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir. 1991); *Mitchell v. Carlson*, 896 F.2d 128, 132 (5th Cir. 1990); *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194-5 (6th Cir. 1990); *Karl Koch Erecting Co. v. N.Y. Convention Center Dev. Corp.*, 838 F.2d 656, 658 (2d Cir. 1988); *Allen v. Ferguson*, 791 F.2d 611, 613-5 (7th Cir. 1986); *Clorox Co. v. U.S. Dist. Court for Northern Dist. of California*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-7 (9th Cir. 1984); *Koreza v. Spirito*, 723 F.2d 1003, 1005 n.1 (1st Cir. 1983); *Katsaris v. United States*, 684 F.2d 758, 761 (11th Cir. 1982); *Armstrong v. Alabama Power Co.*, 667 F.2d 1385, 1387 (11th Cir. 1982); *Southeast Mortg. Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975).

For example, in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), the Court of Appeals for the Ninth Circuit held that appellate jurisdiction exists to review a substantive legal decision which precedes a remand order. The court there held:

> the district court ordered the case remanded to state court after it found the parties' agreement to litigate in state court enforceable. Not only did the court's determination that the forum selection clause was valid and enforceable precede the remand order, it formed the basis of that order. Like the dismissal in *Waco*, the court's decision that the contract clause is enforceable, if not reversed or set aside, is conclusive upon [defendant], and, therefore, must be reviewed. To hold otherwise would deprive [defendant] of its right to appeal a substantive determination of contract law. We cannot believe that Congress intended to immunize such decisions from review.

Pelleport, 741 F.2d at 277.

The general principles and rationale enunciated by the Supreme Court in *Waco* and its progeny are that the statutory nonreviewability rule has its limits and does not extend to insulate from review substantive decisions rendered prior to remand which affect the substantive rights of a party. The extension of 28 U.S.C. § 1447(d) to insulate such decisions from appellate review would deprive a litigant of its right to appeal a substantive legal determination binding upon that party in subsequent proceedings.

As in *Waco*, Petitioners here sought review of a substantive legal decision (*i.e.*, the exclusivity of the Warsaw Convention cause of action) that preceded the remand order. In holding that this aspect of the District Court's decision was not reviewable pursuant to 28 U.S.C. § 1447(d), the Eleventh Circuit sidestepped the essential distinction drawn by the

Court in *Waco* between an appeal from a remand order and an appeal from a decision which precedes a remand order, by characterizing the District Court's exclusivity decision as "intrinsic" to the remand order. Appendix at 6a, *infra*. It is this aspect of the Eleventh Circuit's decision which conflicts in principle with *Waco*.[4]

In order to arrive at its result, the court below disregarded the fact that the District Court separated the exclusivity decision from the subsequent decision to remand. Only after the District Court had decided the exclusivity issue did it then proceed to address the remand issue. The court below also ignored that the "intrinsic" characterization does not take into account the numerous substantive effects that the District Court's decision has on the rights of Petitioners after remand, apart from the jurisdictional effects. For example, the District Court's decision will affect Petitioners' rights as to the applicable substantive law, choice of law rule and measure of damages. *See In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. filed*, No. 91-259 (Aug. 12, 1991). The court below merely chose not to address these issues.

The District Court's exclusivity decision can be applied to any Warsaw Convention case and in a non-jurisdictional context. The Eleventh Circuit's confusion as to the scope and effect of § 1447(d) and *Waco* in an action governed by the Warsaw Convention is evidenced by the preemption cases relied upon by the court below in dismissing the appeal. *See Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989); *Glasser v. Amalgamated Workers Union Local 88*, 806

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4 The District Court decision prior to remand, that the Warsaw Convention does not provide Respondents' exclusive cause of action, is a binding legal decision which affects the substantive rights of Petitioners and is appealable as a final collateral order pursuant to 28 U.S.C. § 1291. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Foster*, 933 F.2d at 1211; *Pelleport*, 741 F.2d at 278. The decision in effect ends the litigation in the federal forum, amounting to a dismissal since its effect is to surrender jurisdiction to the state court and, if not appealable now, the order will be unreviewable. *Id.*

F.2d 1539 (11th Cir. 1986). The courts in those cases would have reviewed the district court decisions preceding the remand orders but for the fact that the federal law which the defendants invoked to support removal did not even apply to the factual allegations in the complaints. Thus, the district court decisions affected only the forum and not the substantive rights of the parties. Unlike *Glasser* and *Hansen*, the applicability of the federal law in this case, the Warsaw Convention, is unquestionable. Moreover, the issue of the exclusivity of the Convention cause of action affects not only the forum in which the case is to be heard but also has conclusive binding effects on the substantive rights of the Petitioners in state court when remanded. Even *Glasser* noted that where the district court reaches "the merits of the preemption argument" the decision is reviewable. 806 F.2d at 1540.

The rationale and principle of *Waco* cannot be circumvented to deprive Petitioners of their right to appeal a decision of substantive law simply by labeling that decision as "intrinsic" to the jurisdictional issue or simply because, in this instance, the "exclusivity" issue also affects jurisdiction.

II

THE ELEVENTH CIRCUIT'S DECISION SANCTIONS A DECISION BY THE DISTRICT COURT WHICH SO FAR EXCEEDS THE PERMISSIBLE LIMITS OF TREATY INTERPRETATION AS TO REQUIRE THE EXERCISE BY THE COURT OF ITS SUPERVISORY POWERS

The decision of the Eleventh Circuit in turn has effectively sanctioned the District Court's erroneous decision that the Warsaw Convention does not provide the exclusive cause of action, a decision which has wide-ranging implications beyond the facts of this case.

Although the District Court recognized that numerous decisions have held that the Warsaw Convention does provide the exclusive cause of action for claims arising out of "interna-

tional transportation," the District Court nevertheless held that the Convention cause of action is not exclusive. In reaching this decision, the District Court ignored the language, goals and drafting history of the Convention, contrary to well established rules of treaty interpretation. *See Eastern Airlines, Inc. v. Floyd*, 113 L. Ed. 2d 569 (1991); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

The language, goals and drafting history of the Warsaw Convention establish that the Convention was intended to create *the* uniform cause of action for damages arising out of international transportation by air. As a treaty which was created for the purpose of establishing uniform rules with respect to the liability of air carriers, the Convention exclusively governs the rights and responsibilities of passengers and carriers wherever it applies. *See Lockerbie*, 928 F.2d 1267; *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670 (S.D. Fla. 1990); *Eggink v. Trans World Airlines, Inc.*, 22 Av. Cas. (CCH) 17,731 (S.D.N.Y. 1990). As the court stated in *Lockerbie*:

> The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see how the existence of state law causes of action could fail to frustrate these purposes.

Lockerbie, 928 F.2d at 1275 (citations omitted).

The District Court's non-exclusivity decision is not an isolated incident. The practice prevails in the Southern District of Florida of permitting plaintiffs to avoid the full application of the Warsaw Convention to wrongful death and personal injury actions simply by not mentioning the Convention in the complaint.[5] In failing to review the District Court's decision regarding the exclusivity of the Warsaw Convention cause of action, the Eleventh Circuit sanctions this practice. Of even greater import, the court below has tacitly decided that the application of the uniform liability rules of the Convention is at the option of the plaintiff. The Court should exercise its supervisory powers in order to ensure the consistent and uniform application of the Warsaw Convention and its goals.

III

THE DECISION BELOW RAISES RECURRING IMPORTANT AND UNRESOLVED QUESTIONS OF FEDERAL APPELLATE JURISDICTION

28 U.S.C. § 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The scope of § 1447(d) in relation to the wholesale remand of Warsaw Convention cases in the Southern District of Florida, and eventually throughout the Eleventh Circuit, raises a recurring important question of federal appellate jurisdiction which should be clarified and resolved by the Court.

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5 There are even conflicting decisions in the Southern District of Florida on this issue. *Compare Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670 (S.D. Fla. 1990) (Convention cause of action is exclusive and removal proper) with *Alvarez v. Aerovias Nacionales de Colombia, S.A.*, 756 F. Supp. 550 (S.D. Fla. 1991) (Convention cause of action is not exclusive and removal improper), *appeal pending*, No. 91-5197 (11th Cir. 1991) and *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986) (Convention cause of action is not exclusive and removal improper).

A. Review is Necessary to End Confusion Among Lower Courts Interpreting 28 U.S.C § 1447(d)

The courts have given § 1447(d) and *Waco* inconsistent interpretations which has led to confusion and irreconcilable conflicts among the lower courts as to the application of § 1447(d) and its effect on the litigants.

Some confusion exists as to whether a substantive decision preceding a remand order merely is "intrinsic" to the remand order or whether such a decision is separate and apart from the remand order and, thus, reviewable. *See, e.g., Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991); *Hansen*, 891 F.2d 1384; *Whitman v. Raley's Inc.*, 886 F.2d 1177 (9th Cir. 1989); *Glasser*, 806 F.2d 1539; *Allen*, 791 F.2d 611; *Clorox*, 779 F.2d 517; *Pelleport*, 741 F.2d 273. The lack of any definitive guidance or standard has resulted in the development of questionable rationale and doctrines which often ignore the substantive effects of such decisions on the parties after remand. *See, e.g., Soley*, 923 F.2d 406; *Whitman*, 886 F.2d 1177. Indeed, the doctrine adopted in *Whitman* and *Soley* as to whether a pre-remand decision is reviewable, is unworkable and irrelevant in a Warsaw Convention case such as here, because only the effect of the Convention, and not its applicability, is disputed.

Similarly, some courts have held that while a substantive decision preceding a remand order is reviewable, the appellate court is powerless to reinstate the action even if the substantive decision preceding remand was erroneous. *See, e.g., Tillman v. CSX Transportation, Inc.*, 929 F.2d 1023 (5th Cir. 1991), *cert. filed*, No. 91-67 (July 8, 1991); *Soley*, 923 F.2d 406; *Allen*, 791 F.2d 611. Yet other courts not only have reviewed the substantive decision preceding a remand order but have reinstated the action. *See, e.g., Foster*, 933 F.2d 1207; *Mitchell*, 896 F.2d 128; *Regis*, 894 F.2d 193; *Clorox*, 779 F.2d 517; *Katsaris*, 684 F.2d 758.

Courts also have held that it is within the state court's discretion, after remand, to determine the preclusive effects of a district court's pre-remand substantive decision in the state

court proceedings. *Hansen*, 891 F.2d 1384; *In re Life Ins. Co. of N. America*, 857 F.2d 1190 (8th Cir. 1988); *Pelleport*, 741 F.2d 273. Other courts have simply defined this troubling issue away, concluding that the district court's pre-remand decision would have no preclusive effect on the state court's consideration of the same issue. *Soley*, 923 F.2d 406; *Whitman*, 886 F.2d 1177; *Survival Systems Division of the Whittaker Corp. v. U.S. Dist. Court for the Northern Dist. of California*, 825 F.2d 1416 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988); *Glasser*, 806 F.2d 1539. The court below simply did not address the preclusive effect that the District Court's exclusivity decision would have on the rights of Petitioners in the subsequent state court proceedings.

Review by the Court, therefore, is necessary to provide definitive guidance to end the recurring confusion and conflict among the lower courts in the application and interpretation of *Waco* and § 1447(d), particularly in relation to the intended scope of the Warsaw Convention cause of action.

B. The Eleventh Circuit Decision Extends the Nonreviewability Rule Beyond the Limits of 28 U.S.C. § 1447(d)

The Eleventh Circuit's extension of the nonreviewability rule to an exclusivity decision preceding a remand order, in actions governed by the Warsaw Convention, is improper and is contrary to the purpose, intent and scope of both § 1447(d) and the Warsaw Convention. The policy underlying the nonreviewability of remand orders is conspicuously absent in cases such as this. The rationale for the rule is to prevent delay by protracted litigation over simple jurisdictional issues and is justified where the decision affects only the forum. This rationale is not applicable when a decision which precedes and then results in a remand order affects the substantive rights of a party after remand. In *Waco*, the Court recognized the right of a litigant, such as Petitioners, to appeal a conclusive substantive legal decision which preceded a remand order. The Court declined to extend the nonreviewability rule to such decisions because to do so would extend the rule beyond its intended scope and purpose.

Therefore, "where a district court bypasses the jurisdictional arguments and reaches the merits of a . . . dispute, the policy [of § 1447(d)] is inapplicable. Any delay caused by [the] appeal . . . is a delay that must be countenanced." *Pelleport*, 741 F.2d at 277.

Federal question removal jurisdiction was intended to provide a federal forum for the protection of federal rights and to encourage the development of expertise by federal courts in the interpretation and application of federal law. *Boys Mkts., Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 246 n.13 (1970).[6] The Court has granted certiorari to ensure the uniform and consistent interpretation of the Warsaw Convention in accordance with the express goals of the treaty. *See Floyd*, 113 L. Ed. 2d 569; *Chan*, 490 U.S. 122; *Saks*, 470 U.S. 392; *Franklin Mint Corp.*, 466 U.S. 243. The extension of § 1447(d) to encompass the District Court's determination that the Warsaw Convention cause of action is not exclusive runs directly counter to the goal of uniformity sought to be achieved by the treaty. The District Court effectively has subordinated a treaty of the United States, created for the express purpose of establishing a uniform system of liability, to a state wrongful death statute, by permitting Respondents to pick and choose the basis for the cause of action even where the Warsaw Convention unquestionably applies.

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6 The extension of the nonreviewability rule to the decision in this action not only binds Petitioners to an erroneous and adverse decision as to the Warsaw Convention by the District Court, but frustrates, rather than facilitates, the formation of a uniform, interpretive body of federal law.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 13, 1991

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-5560

Filed April 19, 1991

JESUS E. CALDERON, as Personal Representative of the Estate of Elvia Mercedes Calderon, Deceased and on behalf of Jesus E. Calderon, Claudia Elena Calderon and Luis Alfonso Calderon,

Plaintiffs-Appellees,

—v.—

AEROVIAS NACIONALES DE COLOMBIA, AVIANCA, INC., COMMODORE AVIATION, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida.

Before:

JOHNSON and BIRCH, *Circuit Judges*, and MERHIGE*, *Senior District Judge.*

BIRCH, *Circuit Judge*:

Appellants Avianca, Inc., Commodore Aviation, Inc. and Aerovias Nacionales de Colombia, S.A. ("Defendants") appeal from an order of the United States District Court for

* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

the Southern District of Florida ("the district court") remanding this case back to state court because of lack of subject matter jurisdiction. 738 F.Supp. 485. A district court order remanding a case to the state court from which it was removed generally is not appealable. Appellants contend that the presumptive effect of a treaty, the Warsaw Convention[1], dictates a different result. We disagree and find that we lack jurisdiction to consider this challenge.

I. BACKGROUND

On January 25, 1990, an Avianca Boeing 707 aircraft operating as Flight 052, en route from Colombia to New York, crashed near Cove Neck, New York. Casualties included 65 passengers killed and 84 passengers injured. Numerous wrongful death and personal injury actions were brought against Defendants. The Judicial Panel on Multidistrict Litigation transferred all of these actions pending in federal courts to Chief Judge Thomas C. Platt of the United States District Court for the Eastern District of New York for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

The present action initially was filed in the Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida ("the state court"). These plaintiffs ("Plaintiffs") sought relief under the Florida wrongful death statute, and deliberately did not allege any federal causes of action. Defendants removed the action to the district court pursuant to 28 U.S.C. § 1441[2], claiming that because this wrongful death

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note (1976).

2 Section 1441 provides in relevant part:

(a) Except as otherwise provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

action arose out of "international transportation" as defined by the Warsaw Convention, the district court possessed federal question jurisdiction.

After removal was accomplished, Plaintiffs filed an emergency motion for remand. In their initial complaint, Plaintiffs alleged only state law causes of action and did not invoke any federal law, treaty or statute. Accordingly, Plaintiffs contended that federal question jurisdiction did not exist. Defendants opposed this motion, arguing that the Warsaw Convention creates Plaintiffs' exclusive cause of action, thereby preempting Plaintiffs' state law claims and establishing federal question jurisdiction. Holding that the Warsaw Convention provides only an exclusive remedy, not an exclusive cause of action, the district court rejected Defendants' arguments and granted Plaintiffs' motion to remand. The case was remanded for further proceedings in the state court.

Defendants subsequently filed a petition for writ of mandamus, requesting that this court direct the district court to vacate its remand order and reinstate the action. In this petition, Defendants again argued that the Warsaw Convention provided the exclusive cause of action for damages arising out of international air transportation, and established federal question jurisdiction. Defendants' petition was denied.

Before the denial of their petition for writ of mandamus, Defendants filed with this court a notice of appeal, seeking substantive review of the district court's order of remand. In response, we requested that the parties address whether the district court's order of remand was appealable. By subsequent order, we directed that this jurisdictional issue be carried with the case. It is this issue which we now address.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

II. DISCUSSION

Congress has established that a case removed from state to federal court may be remanded back to state court "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. § 1447(c). Congress has provided further that appellate courts generally may not review district court remand orders, stating that

> [a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of [Title 28 of the United States Code] shall be reviewable by appeal or otherwise.[3]

28 U.S.C. § 1447(d). This statute prohibits all review of remand orders, even if the district court's decision to remand was clearly erroneous. *See Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977).

In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), the Supreme Court created an exception to the rule prohibiting appeals of remand orders. The Court held that "only remand orders issued under § 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)." 423 U.S. at 346, 96 S.Ct. at 590. Thus, in that case, the district court's decision to remand because the state court docket was less crowded than the district court's docket, despite the presence of subject matter jurisdiction, was subject to review. This limited exception is not applicable to the facts of this case. Here, the district court's order to remand Defendants' case was based on its lack of subject matter jurisdiction, one of the grounds specifically set forth in section 1447(c). *See*

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3 28 U.S.C. § 1443 concerns civil rights cases and is not relevant to the present case.

Armstrong v. Alabama Power Co., 667 F.2d 1385, 1387 n. 3 (11th Cir. 1982).

In *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934), the Supreme Court held that parties may appeal an order dismissing a claim that precedes an order of remand. The Court emphasized, however, that the remand order itself was not appealable. If the court of appeals found the dismissal to be erroneous, that court could "not affect the order of remand, but [could] . . . remit the entire controversy . . . to the state court for such further proceedings as may be in accordance with the law." 293 U.S. at 143-144, 55 S.Ct. at 7. *See also Armstrong*, 667 F.2d at 1387. Other circuits have expanded the holding in *Waco* to apply to preliminary (i.e., made prior to the order of remand) determinations of the validity of forum selection clauses, *see, e.g., Regis Associates v. Rank Hotels, Ltd.*, 894 F.2d 193 (6th Cir. 1990), *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656 (2d Cir. 1988), *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273 (9th Cir. 1984), and the validity of a contractual waiver of the right to remove a case to federal court. *See, e.g., Clorox v. United States Dist. Court for N. Dist. of California*, 779 F.2d 517 (9th Cir. 1985).

Defendants claim that *Waco* and its progeny provide a basis upon which this court may grant jurisdiction in this case. Defendants contend that the district court made a preliminary determination of a substantive issue (that the Warsaw Convention does not preempt Plaintiffs' state law claims) before issuing the order of remand. Therefore, according to Defendants, we have jurisdiction to consider their appeal of this substantive issue as a final collateral order[4] even though

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4 In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), the Supreme Court set forth an exception to the rule that only final judgments of a district court, i.e., those orders terminating the litigation on the merits, may be appealed. This collateral order exception allows appeals from orders which

> (1) finally determine claims collateral to and separable from the substance of other claims in the action; (2) cannot be reviewed along with the eventual final judgment because by then effective review will be

we may not consider the propriety of the district court's order of remand.

Contrary to Defendants' claims, these cases do not provide a basis for our review of this issue. In *Waco* and its progeny, the substantive issue was separable from the decision to remand. In this case, however, the substantive issue is intrinsic to the district court's decision to remand for lack of subject matter jurisdiction. As explained in an earlier decision of this court:

> This 'matter of substantive law' exception . . . is a narrow one: it permits appellate review of a district court remand order only where that order is based solely on a matter of substantive law. It expressly does not permit review of a remand order based on lack of jurisdiction. . . . It is true that . . . the decision underlying the remand order [for lack of subject matter jurisdiction] involved a conclusion of substantive law. However, . . . the substantive law decision related to the question of jurisdiction; the remand order did not affect the substantive rights of the parties."

Glasser v. Amalgamated Workers Union Local 88, 806 F.2d 1539, 1540 (11th Cir. 1986) (footnote and citations omitted). *See also Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989) ("In deciding whether subject matter jurisdiction exists, a district court will reach legal conclusions concerning the presence of diversity or federal question. [Appellant] merely disagrees with the legal conclusion that the district court drew. . . . Assuming . . . that such a decision is erroneous, section 1447(d) precludes review of remand orders based on lack of subject matter jurisdiction even when the decision is wrong." (footnote omitted)). Thus, the "matter of substantive law" exception is not applicable to Defendants' appeal. Accordingly, we do not have jurisdiction to

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precluded and rights conferred will be lost, and (3) are too important to be denied review because they present a serious and unsettled question of law."

In re King Memorial Hospital, Inc., 767 F.2d 1508, 1510 (11th Cir. 1985).

consider the merits of the substantive issues Defendants have presented on appeal.

There is no basis for Defendants' claim that we have jurisdiction to review the district court's remand order. Accordingly, we do not consider any of Defendants' claims regarding the merits of remanding this action. Defendants' appeal is DISMISSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-1045-CIV-ARONOVITZ

Filed May 29, 1990

JESUS E. CALDERON, as Personal Representative of the ESTATE OF ELVIA MERCEDES CALDERON, etc. *et al.*,

Plaintiff(s),

—vs.—

AEROVIAS NACIONALES DE COLOMBIA, AVIANCA, INC., and COMMODORE AVIATION, INC.,

Defendant(s).

ORDER OF REMAND

THIS CAUSE came before the court upon Plaintiff's Emergency Motion for Remand, file dated May 8, 1990 (DE 4). Despite its emergency posture, all parties have been afforded opportunity to respond to the motion, and therefore this matter comes before the Court fully briefed.

This action arises out of the January 25, 1990 crash of Avianca Flight 52, originating in Colombia and scheduled to arrive in New York, New York. Plaintiff's Complaint, filed in state court, seeks damages pursuant to Florida's Wrongful Death Statute, stating no federal causes of action. Defendants AEROVIAS NACIONALES DE COLOMBIA ("Aerovias") and AVIANCA, INC. ("Avianca") assert that since this action involves a death arising from "international trans-

portation" within the meaning of the Warsaw Convention,[1] it is nonetheless properly removable under this Court's federal question jurisdiction. 28 U.S.C. §§ 1331, 1441. Defendants assert no additional bases for federal jurisdiction.

This Court recognizes that a number of Federal Circuit Courts of Appeals have found the Warsaw Convention to, in a sense, preempt state remedies in supplying an exclusive cause of action for incidents of the type at issue here. *See, e.g., Boehringer-Mannheim Diagnostics v. Pan American World Airways*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *In Re Mexico City Aircrash*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Absent, however, any guidance from the Eleventh Circuit Court of Appeals, this Court shall adhere to the view set forth by Chief Judge James Lawrence King in *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986), in holding that the Warsaw Convention, rather than supplying an exclusive cause of action, provides only an exclusive remedy for such actions, however founded. Judge King writes:

> Any recovery, no matter how founded, will be subject to the limitations of the convention

and further, that

> A review of the cases leads to the conclusion that the Plaintiff may choose to state his cause of action solely on a state law theory and bring the action in state court subject to the limitations of the convention.

Id. at 740, 741. Thus, a cause of action may be stated in terms of state law, though a plaintiff choosing to plead as such remains subject to the limitations set forth by the Convention, including, of course, limitations on damages.

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, *reprinted in* 49 U.S.C. § 1502 note (1976). The place of departure, Medellin, Colombia, and place of intended destination, New York, New York, are situated within territories of two High Contracting Parties to the Warsaw Convention.

As further illustrated in *Rhymes*, a Plaintiff "may choose to state his cause of action solely on a state law theory," and further, the "mere pleading of a federal statute or treaty as a defense will not be enough to invoke federal jurisdiction through removal if a federal cause of action does not appear on the face of the well pleaded complaint." *Id.* at 741 (citations omitted). While Plaintiff could have pleaded a federal cause of action, he has chosen to couch the complaint in terms of state law. This Court will not now disturb Plaintiff's choice of forum. This approach is consistent with the view repeatedly adhered to by this Judge as well as other Judges in this district in similar cases. *See Schuster v. Pan American World Airways, Inc.*, No. 83-1292-CIV-SMA (S.D. Fla. June 17, 1983); *Schuh v. Pan American World Airways, Inc.*, No. 83-1294-CIV-SMA (S.D. Fla. June 17, 1983); *Lebreton v. Pan American World Airways, Inc.*, No. 82-1289-CIV-ALH (June 6, 1983); *Quinion v. Pan American World Airways, Inc.*, No. 82-1769-CIV-EPS (Sept. 30, 1982); *Dara v. Pan American World Airways, Inc.*, No. 82-2151-CIV-JLK (Oct. 25, 1982).

THE COURT has considered the Motion, memorandum in support thereof (DE 5), the memorandum in opposition thereto filed by Defendants AEROVIAS NACIONALES DE COLOMBIA and AVIANCA, INC. (DE 8) as joined by Defendant COMMODORE AVIATION, INC. (DE 9), the pertinent portions of the record, and is otherwise fully advised in the premises. Accordingly, and based on the above, it is

ORDERED and ADJUDGED that Plaintiff's Motion for Remand, file dated May 8, 1990 be, and the same is hereby GRANTED. This Cause is accordingly REMANDED to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, WITHOUT PREJUDICE to renew notice of removal if otherwise permitted by law in the event additional parties are added whose presence serves to confer alternative bases for federal jurisdiction upon this Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of May, 1990.

/s/ SIDNEY ARONOVITZ
United States District Judge

copies provided:

Kevin A. Malone, Esq.
Michael K. McLemore, Esq.
Valerie Shea, Esq.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-5560

Filed June 17, 1991

JESUS E. CALDERON, etc. *et al.*,

Plaintiff-Appellees,

—versus—

AEROVIAS NACIONALES DE COLOMBIA, AVIANCA, INC., COMMODORE AVIATION, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING *EN BANC*

(Opinion April 19, 11th Cir., 1991, ____ F.2d ____).

Before:

JOHNSON and BIRCH, *Circuit Judges*
and MERHIGE*, *Senior District Judge.*

* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

STANLEY F. BIRCH, JR.
United States Circuit Judge

(2)

No. 91-418

Supreme Court, U.S.
FILED
OCT 17 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC. and COMMODORE AVIATION, INC.,

Petitioners,

vs.

JESUS E. CALDERON, as Personal Representative of the ESTATE OF ELVIA MERCEDES CALDERON, Deceased, and on behalf of JESUS E. CALDERON, CARLOS ARTURO CALDERON, CLAUDIA ELENA CALDERON and LUIS ALFONSO CALDERON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit correctly refused to review the district court's order of remand pursuant to 28 U.S.C. § 1447(d)?

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No. 91-418

In The

Supreme Court of the United States

October Term, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC. and COMMODORE AVIATION, INC.,

Petitioners,

vs.

JESUS E. CALDERON, as Personal Representative of the ESTATE OF ELVIA MERCEDES CALDERON, Deceased, and on behalf of JESUS E. CALDERON, CARLOS ARTURO CALDERON, CLAUDIA ELENA CALDERON and LUIS ALFONSO CALDERON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent would agree with petitioners' Statement of the Case except in the following regard:

Petitioners' characterization of the district court's order of remand is inaccurate. The district court reached a single decision to remand the case to the state court based upon its finding that the petitioners had pled no federal cause of action.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied for at least three reasons. First, the United States Court of Appeals for the Eleventh Circuit correctly refused to review the district court's decision remanding this case to the state court. Secondly, even though the issue of the exclusivity of the Warsaw Convention is an important one, appeal of a remand order is not a proper avenue of review, especially when there is pending before this Court a petition for a writ of certiorari in a case where review would be appropriate. Thirdly, the Circuit Court of Appeals' decisions consistently apply this Court's opinions in *Thermatron Products Inc. v. Hermansdorfer,* 423 U.S. 336 (1976) and *Waco v. United States Fidelity and Guaranty Co.,* 293 U.S. 140 (1934), as well as the provisions of 28 U.S.C. § 1447(d).

I.

THE ORDER OF REMAND WAS NOT REVIEWABLE UNDER THE COURT'S DECISION IN *WACO v. UNITED STATES FIDELITY AND GUARANTY CO.* OR OTHERWISE.

Petitioners seek review of the Eleventh Circuit's dismissal of the petitioners' appeal of the district court's order remanding this case to the state court. Such an appeal is specifically prohibited

by 28 U.S.C. § 1447(d) which in pertinent part provides as follows:

> An order remanding a case to the State court from which it was removed was not reviewable on appeal or otherwise . . . .

As such, the Eleventh Circuit's dismissal of petitioners' appeal was entirely proper.

Petitioners seek to avoid § 1447(d)'s straightforward prohibition on appeal by characterizing the district court's order as one falling within a narrow exception to the statute's prohibition. In doing so, petitioners rely upon this Court's decision in *Waco v. United States Fidelity and Guaranty Co.*, 293 U.S. 140 (1934). However, this Court's decision in *Waco* offers no support for petitioners' argument. In *Waco*, this Court established a narrow exception to the ban on review. In that case, the district court dismissed a third-party action which had been the sole basis for federal jurisdiction. As a result of that dismissal, the district court determined that it was without federal jurisdiction and remanded the case to the state court. This court in reviewing the Fifth Circuit's dismissal of an appeal from that order stated as follows:

> True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the district court while it had control of the cause. Indisputably, this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

This exception to the ban on review is patently not applicable to the order in this case. There was no order preceding the order of remand which dismissed any federal claim or party. Neither

does the remand order effect any substantive right of the petitioners. Petitioners are free to raise the Warsaw Convention as a defense in the state court action.

Petitioners cite numerous Circuit Court of Appeals cases which have followed the *Waco* decision and have recognized a right to appeal. While respondent would agree that these cases correctly interpret the *Waco* exception to the ban on review, respondent would disagree that they are at all applicable to the case herein. Some of the cases are almost identical to the *Waco* situation, that is, the district court dismisses the party upon whom federal jurisdiction is based and then remands the case. *See, e.g., Mitchell v. Carlson,* 896 F.2d 128 (5th Cir. 1990); *Alien v. Ferguson,* 791 F.2d 611 (7th Cir. 1986); *Koreza v. Spirito,* 723 F.2d 1003 (1st Cir. 1983); *Armstrong v. Alabama Power Company,* 667 F.2d 1385 (11th Cir. 1982); *Katsaris v. United States,* 684 F.2d 758 (11th Cir. 1982); and *Southeast Mortgage Company v. Mullins,* 514 F.2d 747 (5th Cir. 1975). As in *Waco,* the order of dismissal was reviewable in these cases.

The other cases involve situations where the district court made a substantive decision, completely separate and distinguishable from any jurisdictional decision, which dictated remand of the case. The most prevalent of such decisions involves the interpretetion of "forum-selection clauses." In fact, the other cases cited by the petitioners are either forum-selection or forum-waiver cases. *See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273 (9th Cir. 1984); *Foster v. Chesapeake Insurance Company,* 933 F.2d 1207 (3d Cir. 1991); *Regis Associates v. Rank Hotels (Management) Ltd.,* 894 F.2d 193 (6th Cir. 1984); *Karl Koch Erecting Co. v. N.Y. Convention Center Dev. Corp.,* 838 F.2d 656 (2d Cir. 1988); *Clorox v. United States District Court for the Northern District of California,* 779 F.2d 517 (9th Cir. 1985).

The "forum-selection clause" exception to § 1447(d)'s ban on review was first recognized by the Ninth Circuit in *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984). In that case, Pelleport brought a contract claim against Budco in the state court. Budco subsequently removed the case to the federal district court where Pelleport filed a motion for remand arguing that a forum-selection clause in the contract required the case to be in the state court. The district court determined that the forum-selection clause was valid and enforceable and remanded the case.

On appeal, the Ninth Circuit held "the district court's contract interpretation is appealable" because "it reached a substantive decision on the merits apart from any jurisdictional decision". *Pelleport*, 741 F.2d 276-277. In addition, the court found the order interpreting the contract was reviewable, because it was conclusive on the question, and to refuse the appeal deprived Budco of a right to appeal a substantive determination of contract law.

The Ninth Circuit capsulized its *Pelleport* decision in the case of *Clorox v. United States District Court for the Northern District of California*, 779 F.2d 517 (9th Cir. 1985), stating:

> When a district court's remand order is based on a resolution of the merits of soms matter of substantive law "apart from any jurisdictional decision", § 1447(d) does not foreclose appellate review of that decision.

Clorox, 779 F.2d at 520.

Clearly the *Pelleport* line of decisions has no applicability to the instant case. This fact is demonstrated by the opinions in *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989), and *Glasser v. Amalgamated Workers' Union Local 88*, 806 F.2d

1539 (11th Cir. 1986), as well as *Survival Systems Division of the Whitaker Corporation v. United States District Court of the Southern District of California*, 825 F.2d 1416 (9th Cir. 1987), and *Whitman v. Raley's Inc.*, 886 F.2d 117 (9th Cir. 1989).[1] In *Glasser*, the plaintiff brought a state court claim against the union alleging that he had been wrongfully denied certain medical benefits under an employee-benefit plan. The union removed the case to the district court claiming that the Employee Retirement Income Security Act (ERISA) preempted all of the plaintiff's state claims. The district court found that the plaintiff's only pled state law claims and that appellant's federal claims were merely defenses. Applying the well-pled complaint rule, the district court concluded that it lacked jurisdiction and remanded the case to the state court.

On appeal, the union sought to argue that the court should adopt the "matter of substantive-law" exception created by the Ninth Circuit in *Clorox* and *Pelleport*. However, as the Eleventh Circuit court noted, the exception is a narrow one.

> [I]t permits appellate review of a district court remand order only where that order is based solely on a matter of substantive law. It expressly does not permit review of a remand order based on a lack of jurisdiction. *Clorox*, 779 F.2d at 520. *Pelleport*, 741 F.2d at 276-77. Therefore, we will not consider whether we will adopt this exception because, even if we did, the remand order in the

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1. Petitioners argue that the court's decisions in *Glasser* and *Hansen* are not applicable because the district court's remands therein were based upon their finding that the federal law which the defendants invoked to support removal did not apply to the factual allegations in the complaint. In *Glasser*, this is clearly not the case. As for *Hansen*, although the district court found that federal law did not apply, the reasoning of ths Ninth Circuit is still very instructive.

> instant case would not be appealable. The district court expressly based its decision to remand on the conclusion that it lacked subject matter jurisdiction.
>
> It is true, as in *Clorox* and *Pelleport,* the decision underlying the remand order involved a conclusion of substantive law. However, unlike in those cases, *here the substantive-law decision related to the question of jurisdiction; the remand order did not affect the substantive rights of the parties. Compare Clorox,* 779 F.2d at 520; *Pelleport,* 741 F.2d at 276-77. In particular, the court did not reach the merits of the preemption argument. The state court may, in fact, rule that ERISA does preempt appellee's state-law claims and that appellees must proceed as appellants contend, under § 1132(a)(1)(B) of ERISA.

(Emphasis added.) *Glasser,* 806 F.2d at 1540.

In *Hansen,* Mrs. Hansen brought a claim in the state court against Blue Cross for failure to pay insurance benefits. Blue Cross removed the action based solely on the existence of a federal question contending that Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, (ERISA) preempted the state-law claims. The district court determined that under the allegations of the complaint, Hansen's claims were not ERISA claims because she had paid her own premiums. Accordingly, the district court remanded the case. In this regard, petitioner is correct that the decision to remand was based upon the court's determination that the federal law did not apply to the plaintiff's claim. However, this fact offers no support to petitioners and was rejected by the Ninth Circuit. On appeal, before the Ninth Circuit, Blue Cross argued that because the district court made a factual determination

that Hansen paid her own premiums and then concluded that her policy was not covered by ERISA that the order was reviewable. The Ninth Circuit disagreed stating that the district court had not decided a disputed issue of fact, but merely looked to the allegations of Hansen's complaint. Secondly, the Ninth Circuit found *Pelleport* did not apply because:

> Blue Cross fails to demonstrate how the district court's legal decision was *apart* from the question of subject-matter jurisdiction as required to fall within the exception to non-reviewability establishsd by *Thermatron* and its progeny . . . . In deciding whether subject-matter jurisdiction exists, a district court will reach legal conclusions concerning the presence of diversity or a federal question. Blue Cross merely disagrees with the legal conclusion that the district court drew . . . . Assuming, without holding, that such a decision is erroneous, section 1447(d) precludes review of remand ordsrs based on lack of subject-matter jurisdiction even when the decision is wrong.

Hansen, 891 F.2d at 1388.

Blue Cross also argued that it could appeal the district court's finding that Hansen's complaint was not an artfully pled state-law claim. However, as the Ninth Circuit noted:

> A district court's decision that a complaint is not artfully pled is a jurisdictional decision related to the application of the well-pleaded complaint rule.

Hansen, 891 F.2d at 1389.

Similarly, in the case of *Survival Systems Division of the*

Whitaker Corporation v. United States District Court of the Southern District of California, 825 F.2d 1416 (9th Cir. 1987), the plaintiff brought a state-court action asserting various wrongful discharge claims and claims for intentional and negligent infliction of emotional distress against her employer. The employer removed the case to the federal court based on preemption under federal labor law. The court found that all but one of the employee's claims was preempted by the National Labor Relations Act and thus dismissed them. However, it found that her claim for intentional infliction of emotional distress was not preempted. Based upon this finding, the district court remanded the emotional distress claim to the state court. The employer appealed relying upon the Ninth Circuit's previous decisions in *Pelleport* and *Clorox.* The Ninth Circuit denied review stating as follows:

> In this case, the order of remand did not resolve a matter of substantive law, as in *Pelleport* or *Clorox.* The ruling of the district court was that the state cause of action alleged in Rodriquez' complaint was not an artfully pled federal claim that was preempted by federal labor law. This did not finally resolve the issue of preemption, which could still be raised as a defense to the state claim in the state court. Thus, if the proof in state court were such as to justify the conclusion that the cause of action was completely preempted by federal labor law, the defense of preemption could be sustained. The ruling of the district court was simply that the allegations of the complaint did not justify such a result.
>
> Thus, the only issue decided by the remand ordsr is the jurisdictional issue that the claim of intentional infliction of emotional distress was a state claim and not an artfully pled federal claim.

> The district judge then exercised her discretion in remanding that state claim. Therefore, the remand is not reviewable on appeal as a substantive decision under the doctrine of *Pelleport* and *Clorox*.

Survival Systems, 825 F.2d at 1418.

Finally, in two companion cases out of the Ninth Circuit, *Whitman v. Raley's Inc.*, 886 F.2d 117 (9th Cir. 1989) and *Krentz v. Connecticut General Life Insurance Company*,[2] 886 F.2d 117 (9th Cir. 1989), the court posed the following issue and response:

> Does 28 U.S.C. § 1447(d) bar review of remand orders that are based on a finding that federal law does not completely preempt plaintiff's state claims? We hold that it does.

In reaching this decision, the court applied the following reasoning:

> A distinction must be drawn between the inquiry the district court faces in considering whether a case was properly removed and the inquiry as to whether a preemption defense exists. At the removal stage, the inquiry is solely whether congress intended a preemptive force so powerful as to displace entirely any state cause of action within the ambit of the federal cause of action . . . .

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2. In *Whitman*, the issue raised was whether § 301 of the Labor Management Relations Act completely preempted plaintiff's state claims. And in *Krentz*, the issue was whether or not ERISA completely preempted plaintiff's state claims.

This jurisdictional issue of whether "complete preemption" exists is very different from the substantive inquiry of whether a "preemptien defense" may be established. The jurisdictional question concerning "complete preemption" centers on whether it was the intent of Congress to make the cause of action a federal cause of action and removable despite the fact that the plaintiff's complaint identifies only state claims. The latter inquiry, concerning a "preemption defense", is a substantive inquiry as to whether a legal defense exists. This would be a matter for trial by a court having jurisdiction. The possible existence of a "preemption defense" does not justify removal . . . .

On a remand petition where the removal petition is based on complete preemption, the sole issue before the district court is whether the plaintiff's claim is one of those claims that is "completely preempted" by federal law. If the court rules that the claim is not "completely preempted", the federal court lacks jurisdiction to rule on the substantive preemption defense.

A remand based on lack of "complete preemption" is a remand required by 28 U.S.C. § 1447(c) . . . . When a case is remanded on the ground that the federal court is without jurisdiction pursuant to § 1447(c), the remand order "is not reviewable on appeal or otherwise". 28 U.S.C. § 1447(d); *Thermatron Products Inc. v.*

Hermansdorfer, 423 U.S. 336 (1976).[3]

As one can see, neither *Waco* or its progeny in any way support review of the order of remand entered by the district court in this case. Petitioners have failed to demonstrate that the district court's legal decision regarding the Warsaw Convention was apart from the question of subject-matter jurisdiction. The ruling of the district court was that the state cause of action alleged in respondent's complaint was not an artfully pled federal claim that was preempted by federal law. The only issue decided by the remand order was the jurisdictional issue that plaintiff's claim was a state claim and that the federal court thus lacked jurisdiction to hear the matter. This did not finally resolvs the issue of whether or not the Warsaw Convention applies to the case because this can still be raised as a defense to the state claim in the state court. The remand in this case was based on the lack of "complete preemption", and thus was a remand required by 28 U.S.C. § 1447(c). When a case is remanded on the ground that the federal court is without jurisdiction pursuant to § 1447(c), remand order is not reviewable on appeal or otherwise. *Thermatron Products Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). As such, the Eleventh Circuit properly dismissed petitioners' appeal. This Court should likewise deny petitioners' petition for a writ of certiorari.

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3. The reasoning in *Whitman/Krentz* was followed by the Fifth Circuit in *Soley v. First Nat'l Bank of Commerce,* 923 F.2d 406 (5th Cir. 1991).

II.

ALTHOUGH THE EXCLUSIVITY OF THE WARSAW CONVENTION IS AN IMPORTANT ISSUE, REVIEW OF AN ORDER OF REMAND IS NOT THE PROPER AVENUE TO ADDRESS THE ISSUE.

Respondent would agree that the issue of whether the Warsaw Convention provides plaintiff's exclusive cause of action is an important issue. However, respondent strongly disagrees that this petition for writ of certiorari is the appropriate avenue for this Court to address that issue. It is noted by petitioner that this Court has on several occasions addressed the Warsaw Convention but always as the result of a proper avenue of review. Moreover, the plaintiffs in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. filed*, No. 91-259 (Aug. 12, 1991) have petitioned this Court for review of the Second Circuit ruling on the exclusivity issue. As such, this Court does have an appropriate avenue to review the issue of the Warsaw Convention's exclusivity should it wish to do so.

III.

THE CIRCUIT COURTS OF APPEALS' DECISIONS REGARDING REVIEW OF REMAND ORDERS ARE CONSISTENT.

Petitioners' assertion that the Circuit Courts of Appeals differ widely in their determination of the reviewability of remand orders is erroneous. As demonstrated earlier, the Circuit Courts of Appeals have been able to properly apply the criteria set forth by this Court in *Thermatron Products Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and *Waco v. United States Fidelity and Guaranty Co.*, 293 U.S. 140 (1934).

Where the district courts entered an order dismissing a federal party or claim prior to the order of remand, the Circuit Courts of Appeals have appropriately allowed review of the order of dismissal. The courts have also allowed review of substantive orders which precede the order of remand and which decide substantive issues completely separate from jurisdiction which are binding upon the parties.

The Circuit Courts of Appeals have also consistently refused to review orders of remand in situations where the order of remand is based upon a substantive decision which is intrinsically intertwined with a jurisdictional issue. Such courts have correctly interpreted this Court's decision in *Thermatron* as banning review of remand orders issued under 28 U.S.C. § 1447(c). Where, as here, the decision to remand the case is based upon a district court's finding that it is without jurisdiction to hear the matter, the courts have correctly dismissed appeals of the remands. Petitioner is unable to point to a single case where under such circumstances a Circuit Court of Appeals has granted review. The Circuit Courts' interpretation is not an expansion on the prohibition found at 28 U.S.C. § 1447(d), rather it is merely a proper interpretation of a straightforward legislative enactment prohibiting review. If petitioners are dissatisfied with the ban on review of remand orders, the avenue for relief is through the legislative process not by insupportable judicial interpretation of the statute.

CONCLUSION

In conclusion, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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